no jurisdiction. Even if residence alone conferred jurisdiction which, in view of the *Inverclyde* case it does not, the parties to this suit are not and never were resident here.

For these reasons I think that leave to file the petition and to serve it in any way would be a vain thing and must be refused.

Should the petitioner wish to appeal I am prepared to give a certificate.

If there is an appeal notice should be given to the Attorney General.

Order accordingly.

GHOUSE BIN HAJI KADER MUSTAN vs. REX.

[App. Crim. Juris. (McElwaine, C.J.) November 3, 1941]

Penal Code, Section 363 — Kidnapping from lawful guardianship — Position of Mohammedan girl who has attained puberty — Evidence Ordinance Ss. 121 (2), 123 — Whether wife of accused can be compelled to give evidence against him — Mohammedan Law.

The appellant in this case appealed against his conviction on a charge of kidnapping a Mohammedan girl under the age of 16 years from the lawful guardianship of her father. On appeal it was argued (inter alia) (1) that the only material witness as to the kidnapping was the girl herself and as the appellant had married the girl, she could not be compelled to give evidence against him, (2) that as the girl had attained puberty she was discharged from guardianship and therefore she had no guardian from whose keeping she could be kidnapped.

Held, (1) that the District Judge who convicted the appellant was fully within his rights in compelling the wife to give evidence, as her evidence did not fall under any section of the Evidence Ordinance which enacts that she shall not be compelled to give such evidence,

(2) that as the girl had attained puberty, she had no guardian and therefore she was not taken out of the keeping of the lawful guardian and that on this ground the appeal should be allowed.

Cases referred to:—

(1) *R. v. Leach* 1912 A.C. 305.

(2) *R. v. Wakefield* 2 Lewin 279.

(3) *Yeo Hock Cheng v. R.* 7 M.L.J. 104.

(4) *Swami v. King Emperor* 8 M.L.J. 59.

(5) *R. v. Amkeyo* 7 East African Law Report 14.

(6) *Robin v. R.* 12 East African Law Report 134.

(7) *Hyde v. Hyde* 1 P. & D. 130.

(8) *Salmah & another v. Soolong* 1 Kyshe 421.

(9) *Noordin v. Sheik Mohamed Meah Noordin Shah* 10 S.S.L.R. 72.

(10) *Mohamed Ibrahim v. Gulam Ahmad* (1864) 1 Bombay H.C.R. 236.

(11) *Choa Choon Neoh v. Spottiswoode* 1 Kyshe 216.

(12) *Miran Baksh* (1905) 2 Cr. L. J. 190.

(13) *Ex parte Tan Swee Eng* 10 M.L.J. 191.

(14) *Jamaludin v. Hajee Abdullah* 1 Kyshe 503.

D. Marshall for the appellant.

C. H. Butterfield for the Crown.

McElwaine, C.J.—The appellant appeals against his conviction on a charge:—

That he, on or about the 25th July 1941 at Singapore, kidnapped one Isah binte Shaik Buramdeen, a female then under the age of 16 years from lawful guardianship of one Shaik Buramdeen, her father, and had thereby committed an offence punishable under section 363 of the Penal Code.

There were four main grounds of appeal:—

1st That on the evidence the District Judge ought not to have convicted.

2nd That the only material witness as to the kidnapping was the girl Isah herself and as the appellant married this girl on 26th July and as she is still his wife she could not be compelled to give evidence against him, and the District Judge did compel her.

3rd That Isah having attained puberty was discharged from guardianship and therefore she had no guardian from whose keeping she could be kidnapped.

4th That it was established that the girl who was a Mohammedan of the Hanafi Sect, had attained puberty before the 25th day of July 1941. She was not a minor according to Mohammedan law and that the offence of kidnapping from lawful guardianship can only be committed in respect of a minor or of a person of unsound mind.

On the first point it is sufficient to say that the evidence was sufficient to support the conviction unless the point raised in any one of the three remaining grounds of appeal is determined in favour of the appellant.

The second ground is based on section 121 (2) of the Evidence Ordinance "In criminal proceedings against any person the husband or wife of such person respectively shall be a competent witness."

Mr. Marshall, who argued this case very well, laid great stress on the fact that the subsection does

not use the word "compellable" and he referred to the rule of English law that a wife is not compellable except in a limited number of cases. He referred to *R. v. Leach*[1] and to the cases mentioned in *Archbold*, 30th Ed. p. 478. I do not think it necessary to consider these cases or *R. v. Wakefield*[2]. Under section 123 a spouse may be compelled to disclose a communication made during marriage if it is relevant in a prosecution for any crime committed against the other.

Mr. Marshall submitted that the Evidence Ordinance must be construed in relation to its background, the common law. In *Yeo Hock Cheng v. R.*[3], I was in the minority in construing section 32 (1) in accordance with what I conceived to be its background, and it is clear that in *Swami v. King Emperor*[4] the Judicial Committee disapproved of my method of interpretation.

In *R. v. Amkeyo*[5] it was held that communications made by a husband to his wife were not privileged, the reason being the essential difference between the English union of one man and one woman for life to the exclusion of all others, and a native marriage. In *Robin v. R.*[6] the East African Court of Appeal expressed the view that the evidence of a wife, by native custom, against her husband is admissible. The latter part of section 120 of the Indian Evidence Act, which was in force, is identical with section 121 (2) of the Colony Ordinance, but the point as appears from the headnote, seems to have been whether section 122 of the Indian Evidence Act (which corresponds to section 123 of the Colony Ordinance) excluded a communication made during marriage where the marriage was not a marriage in the sense of *Hyde v. Hyde*[7] and the Court thought that it did not.

Those cases are of course not binding on this Court but they are entitled to great respect. If a witness in this Colony is "competent" and has been summoned he is bound to give evidence, and to answer all relevant questions. There is no class of witness who can be called a "compellable witness." The words "compellable" when used in the Evidence Ordinance relate not so much to a witness as to a type of evidence; and in my opinion a witness may be compelled to give any relevant evidence unless a section enacts that he shall not be compelled to give it. Such sections are 122–127 and 130.

The District Judge was fully within his rights in compelling the wife to give evidence, as her evidence did not fall under any section which enacts that she shall not be compelled to give such evidence.

The third point was that the girl was not under guardianship. The girl was between 14 and 15 years of age and had attained puberty some months prior to 25th July 1941. The Kathi who questioned the girl and recorded her answers before he married her to the appellant, gave evidence in which he said "according to Hanafi school a girl who attains the age of puberty attains the age of majority and is at liberty to contract her own marriage according to her own wish; her father's consent is utterly immaterial to her marriage then after puberty to a Mohammedan even against the consent of her parents; a girl who has attained puberty is major in all matters and has no guardian." This proposition of law accords with the decision of Sidgreaves C.J. in *Salmah & another v. Soolong*[8].

In *Noordin v. Sheik Mohamed Meah Noordin Shah*[9] Thornton J. said:—

> "From the authorities on Mohammedan law I have been able to consult, it seems clear that the Islamic system definitely recognizes two distinct periods of majority one of which (with which we are chiefly concerned) has reference to the emancipation of the person of the minor from the patria potestas, and the other to the assumption by him of the management of his property, i.e. the age of puberty and the age of discretion.
>
> "Among the Shafees as well as the Hanafis, puberty is presumed on the completion of the 15th year. At that age also, according to the rules of the Hanafi sect, a daughter can enter into a contract of marriage even without her father's consent."

In that case the girl was over 17 years of age, so the presumption of puberty arose, but if puberty has in fact been attained and can be proved there is no need to resort to the presumption. Puberty appears to be the test of whether or not a girl is emancipated from the patria potestas, and Thornton J. appears to recognize that as he refers to *Mohamed Ibrahim v. Gulam Ahmad*[10] which appears to be the same case as one considered by Sidgreaves C.J., although the latter gives the reference as I Bom. H. C. R., while Thornton J. gives 2 Bom. H. C. R. As this series of reports is not in the Library I have been unable to check the reference.

Thornton J. then says "Che Chee, having attained puberty, is free from the custody of her guardian as regards the selection of her husband."

In the Charter of 1855, 1 Braddell's Law of the S.S., at p. 275, the Court was directed to pay due attention to "the several religions, and manners and usages of the native inhabitants."

In *Choa Choon Neoh v. Spottiswoode*[11] Maxwell C.J. enunciated the principle in a passage which was approved by the Privy Council:—

"In this Colony, so much of the law of England as was in existence when it was imported here, and as is of general (and not merely local) policy, and adapted to the condition and wants of the inhabitants, is the law of the land; and further, that law is subject, in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them. Thus in questions of marriage and divorce, it would be impossible to apply our law to Mohamedans, Hindoos, and Buddhists, without the most absurd and intolerable consequences, and it is therefore held inapplicable to them."

I was referred to no case or ordinance which overrides this principle. We have no ordinance corresponding to the F.M.S. Age of Majority Enactment (Cap. 68). Ratanlal in the 14th Edition of his Law of Crimes at p. 863 refers to the case of *Miran Bakhsh*[12], in which it was held that a girl of 16 years of age had a lawful guardian, but that case was after the Indian Age of Majority Act came into force.

Section 26 (2) of the Mohammedans Ordinance enacts "Mohammedan law, in the absence of special contract between parties, shall be recognised by the Courts of the Colony only so far as is expressly enacted in this Ordinance." The Ordinance is silent on all questions of majority, minority and guardianship, and the question is, is the subsection which I have quoted a general one, or does it relate only to the law governing succession and inheritance of property?

In *Ex parte Tan Swee Eng*[13] the Court of Appeal held, in the words of Terrell J.A. "as regards the construction of section 5 subsection 2 of the present Ordinance (i.e. the Increase of Rent (Restriction) Ordinance, 1939) I feel no doubt that a clause of general application phrased in clear and unambiguous terms is not to be restricted, merely because it occurs in a subsection."

In that case there was nothing to indicate that the subsection should confer a power to rehear only applications to fix rents and not applications to eject, and the whole argument that it had this narrow effect was based on its being a subsection of the section fixing rents and its being omitted from the section relating to ejectment.

Section 26 of the Mohammedans Ordinance is in Part III which is headed EFFECT OF MARRIAGE ON PROPERTY, and the whole part deals with this subject. Subsection (1) says "the modifications of the law of property to be recognised in the case of Mohammedan marriages shall be as enacted in this Ordinance", and subsection (3) provides that nothing in this Ordinance shall prevent a Mohammedan directing by will that his estate is to be administered according to Mohammedan law. Subsection (2) itself contemplates a special contract whereby the parties may make Mohammedan law applicable. I think that this only means that a contract touching property can be made which invokes Mohammedan law and that it does not mean that parties can invoke Mohammedan law to affect their own status.

The Ordinance in principle, though not in detail, is very similar to the Mohammedan Marriage Ordinance, 1880. Indeed, Part III seems never to have been repealed, though it has been amended. Part III of the 1880 Ordinance was also headed "Effect of Marriage on Property." Section 27 read "Whereas it is expedient to define the modifications of the laws of property to be recognized in the case of Mohammedan Marriages, it is further enacted that ...." Then follows the clause identical with the present section 26 (2) to which is added the present subsection (3) in the form of a proviso.

In *Jamaludin v. Hajee Abdullah*[14] Wood J. held that Mohammedan law in section 27 (2) must be read as Mohammedan law of property.

In my opinion the present section 26 (2) only relates to Mohammedan law of property. The Ordinance of 1880 contained a definition of "minors." That definition accords with the law enumerated by Sidgreaves C.J. in 1878. "Minors are those who have not arrived at the age of puberty, or who have not reached the age of fifteen years. On their arriving at the age of puberty, or at the age of fifteen years, whichever shall happen first, such persons cease to be minors." That definition does not now appear in the Mohammedans Ordinance, but neither, so far as I can find, does the word 'minor'. Walees also are not mentioned.

Section 11 (3) of the present Ordinance requires a Kathi to satisfy himself as to the validity of the marriage. That means its validity according to Mohammedan law. If puberty has not been reached that law requires the intervention of a Walee; if it has been reached no Walee is necessary.

In my opinion section 26 (2) has no bearing on the question of minority or guardianship or marriage, though a male child taking out administration to his mother's estate must be of the full age of twenty-one years. That is quite another matter. To hold otherwise would throw doubts on the validity of Mohammedan marriages as these are not "expressly" stated to be governed by Mohammedan law. I follow

the decision of Sidgreaves C.J. and hold that this Mohammedan girl having attained puberty, had no guardian, and therefore she was not taken out of the keeping of the lawful guardian and on this ground I allow the appeal.

It is not necessary to consider separately the fourth ground of appeal, that this girl was not a minor, but I draw attention to the distinction which Thornton J. pointed out between the age of puberty and the age of discretion. A Mohammedan may be a minor for one purpose, such as for the purpose of contracting or suing, but not for others, such as marriage and guardianship. Whether the law should not be amended is for others to consider.

I may mention that attention was drawn to the word 'minor' in the marginal notes of sections 372 and 373. A marginal note the Commissioner preparing Revised Editions of the laws has had power to supply or alter (Ordinance 25 of 1925 section 3 (3), Ordinance 38 of 1935 section 4 (4)) cannot safely be combined with the text of the section as constituting a definition. 'Minor' is a short, if not perfectly accurate, word used to replace "person under the age of twenty-one years." It is most noticeable that 'minor' is not used in the text. Sections 372 and 373 create offences against persons of all races and religions who are under the age of twenty-one years. Had the word 'minor' been used we would have the same difficulty as in occasioned in section 361.

I observe that 'minor' occurs in the marginal notes to sections 372 and 373 of the F.M.S. Penal Code where by reason of the Age of Majority Enactment a Mohammedan who has completed the age of eighteen years is not a minor.

If section 361 was not intended to recognize different ages at which minority ceases according to the usages and customs of different races and religions, one would expect it to use the word 'person' instead of the word 'minor'.

The appeal is allowed.

Appeal allowed.

F. M. S. REPORTS.

T. S. B. MANIAM vs. PUBLIC PROSECUTOR.

[Miscellaneous Crim. Application (Horne, J.)
April 19, 1941]

Road Traffic Enactment, 1937 Section 53 (1) and (2) — Duty of prosecution to prove that there was no policy in force.

The accused pleaded guilty and was convicted on the following charges (1) failing to display a distinguishing mark (the learner's 'L') contrary to Rule 13 (4) (iii) of the Motor Vehicles (Driving Licences) Rules 1937 (2) using a motor vehicle while holding a provisional licence without the supervision of a licence holder contrary to Rule 13 (4) (i) of the Motor Vehicles (Driving Licences) Rules 1937. The accused was also charged for using a motor vehicle without there being in force in relation to himself as user a policy of insurance as required by the Road Traffic Enactment 1937 contrary to Section 51 (1) and (2) of that Enactment. To this charge the accused pleaded guilty and he was convicted. On these convictions being reported to the Transport Board, the Board brought the matter to the notice of the Court objecting that the conviction on the third charge was wrong in law. It was apparently considered in the Magistrate's Court that the breaches of rules comprised in the first two charges would enable the insurers at their option to avoid the policy issued under the Enactment and that therefore at the time of the offence there was no policy in force.

Held, that it must be proved beyond reasonable doubt that there was no policy in force and that until the policy has in fact been avoided by the insurer no Magistrate can safely convict solely on an admission of the breach of condition of the licence.

Cases referred to:—

(1) Smith's Case (1879) 11 Ch. D. 579

Draper for the Public Prosecutor.

Horne, J.—The applicant pleaded guilty in the Seremban Magistrate's Court to three charges:—

(1) failing to display a distinguishing mark (the learner's "L") contrary to Rule 13 (4) (iii) of the Motor Vehicles (Driving Licences) Rules 1937;

(2) using a motor vehicle while holding a provisional licence without the supervision of a licence holder contrary to Rule 13 (4) (i) of the Motor Vehicles (Driving Licences) Rules 1937;

(3) using a motor vehicle without there being in force in relation to himself as user a policy of insurance as required by the Road Traffic Enactment 1937 contrary to section 51 (1) and (2) of that Enactment.

He was fined (1) $5/- (2) $10/- and (3) $25/- and disqualified from holding a licence for 12 months.

At the time of these convictions he had a driving licence limited to vehicles of 12 H.P. and a provisional licence for vehicles not exceeding 2½ tons.

Apparently it was considered that the breaches of rules comprised in the first two charges will enable the insurers at their option to avoid the policy issued under the Enactment and therefore at the time of the offence there is no policy in force.